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Nos. 98-1701 & 98-1706

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GARY LOCKE, ET AL.,

Respondents.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS,

Petitioner,

v.

GARY LOCKE, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE GOVERNMENT OF CANADA IN SUPPORT OF PETITIONERS

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42 pp

QUESTION PRESENTED

Whether the Best Available Protection regulations adopted by the State of Washington with respect to the operation of vessels in the waters of the State of Washington conflict with the treaty obligations that the United States owes to Canada.

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This amicus brief is submitted in support of Petitioners. All parties have consented to the filing of this brief amicus curiae.[1]

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[1] No counsel for a party authored this brief in whole or in part. No person other than the amicus made a monetary contribution to the preparation or submission of this brief.

THE INTEREST OF AMICUS CURIAE THE GOVERNMENT OF CANADA

Canada and the United States are parties to the bilateral treaty proposed by Canada and accepted by the United States on December 19, 1979, and entitled Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (CVTMS Agreement), Dec. 19, 1979, U.S.-Can., 32 U.S.T. 377 (entered into force Dec. 19, 1979).[2] The geography of the Strait of Juan de Fuca region makes the CVTMS Agreement vital to the ability of both countries' ship traffic to operate safely in that region.

Canada and the United States are also parties to several multilateral conventions governing international shipping, collectively referred to as the International Maritime Treaties.[3] Canada has participated in good

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[2] The CVTMS Agreement is set forth in the Appendix at A-3 toA-22.

[3] These include the International Convention for the Safety of Life at Sea (SOLAS Convention), Nov. 1, 1974, 32 U.S.T. 47 (entered into force May 25, 1980), as amended; the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), July 7, 1978, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996) (entered into force April 28, 1984), as amended by the Seafarers' Training, Certification and Watchkeeping Code, July 7, 1995, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996); and the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), Nov. 2, 1973, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997), as amended by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997).

faith in negotiating and implementing these treaties with the United States.

Because the State of Washington's Best Available Protection (BAP) regulations, Wash. Admin. Code § 317-21-010 et seq., undermine internationally-agreed standards adopted through these treaties, those regulations threaten the orderly operation of maritime traffic in the region. Moreover, if the State of Washington is permitted to dictate the conditions of operation of this international maritime traffic, the door will be open for other local jurisdictions of the United States to erect their own, varying regulations, thereby creating a regulatory patchwork along North America's sea coasts and inland shores and endangering the uniform system adopted by treaty.[4]

STATEMENT OF FACTS

Vancouver is Canada's largest port. In concert with ports in the surrounding area, it handles thousands of cargo, container, and bulk shipments each year. These ports are the gateway to western Canada and their smooth operation is key to Canada's economy.

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[4] Canada also notes that, given the interests of its members, Intertanko chose to challenge only those portions of the BAP regulations dealing with tank vessels. Other sections of the BAP regulations raise many of the same concerns with respect to oil barges, especially vis-à-vis the CVTMS Agreement. The BAP regulation of oil barges should not be permitted to stand independent of the BAP regulations on oil tankers.

Commercial vessel traffic can access Vancouver and those regional ports from sea in two ways: Johnstone Strait and the Strait of Juan de Fuca. *See* Diagram 1. Johnstone Strait is narrow and hazardous. For that reason it has become accepted practice in the international shipping community to access Vancouver and the regional ports via the Strait of Juan de Fuca.

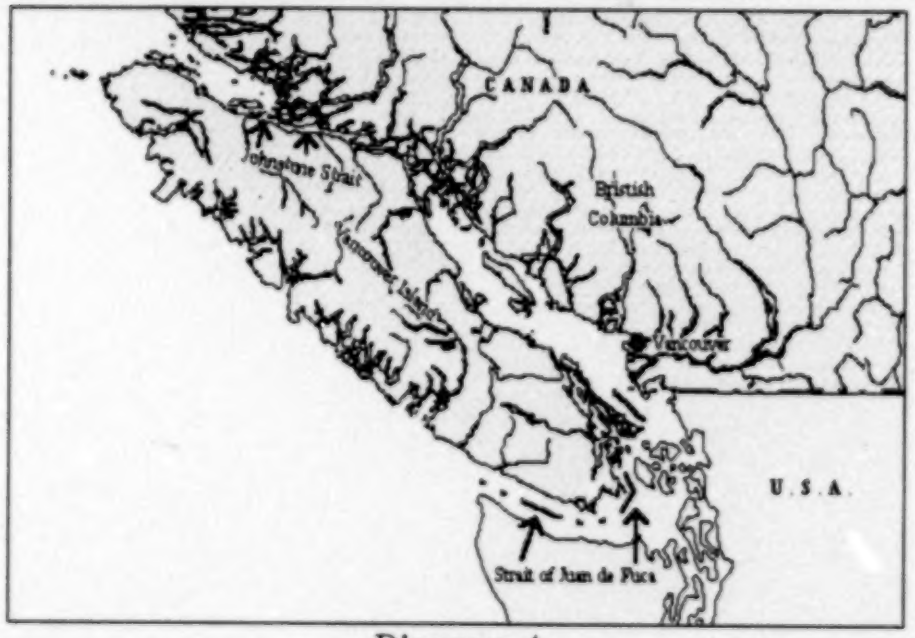

Diagram 1

To promote safe and orderly passage through the Strait of Juan de Fuca, Canada and the United States agreed in the CVTMS Agreement to devise a cooperative system of vessel traffic management. Under this system, all inbound traffic in the strait, regardless of destination, is routed through United States waters, while all outbound traffic is directed through Canadian

waters. The International Maritime Organization endorses this vessel traffic separation scheme.

In agreeing to this vessel traffic separation scheme, Canada relied on the United States' undertaking in the CVTMS Agreement that vessels bound for Canadian ports that complied with Canadian regulations regarding "vessel design, construction, manning and equipment" would be deemed to be in "material compliance" with the United States' own requirements. CVTMS Agreement, art. 204.2 (A-12). Canada has expressed its difficulties with the BAP regulations to United States authorities over many years, as well as through diplomatic representations, the most recent of which was a diplomatic note dated 7 May 1997. Diplomatic Note from the Embassy of Canada to the U.S. Department of State (Note No. 0389).[5/]

SUMMARY OF ARGUMENT

The treaties between the United States and Canada require the United States to honour its treaty obligations in respect of its entire territory. The BAP regulations enacted by Washington State are incompatible with the reciprocity provisions of both the CVTMS Agreement and the International Maritime Treaties.[6/]

[5/] Diplomatic Note 0389 is set forth in the Appendix at A-1 to A-2.

[6/] Both Petitioners contest, as a matter of United States law, the propriety of the Ninth Circuit's refusal to consider the United States' (continued...)

ARGUMENT

I.

The United States Is Required to Honour Its Treaty Obligations in Respect of its Entire Territory

Customary international law is binding on the United States. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793). *Pacta sunt servanda* is a well-established principle of international law, which provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. *See* 1 *Oppenheim's International Law*, Part 4, § 584, at 1206 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992); Vienna Convention on the Law of Treaties, May 22, 1969, arts.

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[6]/(...continued)
obligations to Canada. *International Ass'n of Independent Tanker Owners* v. *Locke*, 148 F.3d 1053, 1063-64 (9th Cir. 1998). *See* U.S. Pet. Cert. at 27 n.14 & Intertanko Pet. Cert. at 26-27. Regardless of whether the specific parties to this dispute properly preserved the issue of the United States' obligations to Canada in the lower court, the United States remains obligated under standards of international law to conform its conduct to its treaty obligations to Canada.

26, 27, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331 (1969) ("Treaty Convention").[7]

It is equally well-established that a party to a treaty may not invoke provisions of its internal law as justification for failing to honour its treaty obligations, and that, unless a different intention is set forth in the treaty in question, a treaty is binding upon each party in respect of its entire territory. Treaty Convention, art. 29; *Estate of Pellat* v. *Mexico*, 5 Reports of Int'l Arbitral Awards 534, 536 (Fr.-Mex. 1929); Ian Brownlie, *State Responsibility in* 1 *System of the Law of Nations* 1, 141-42 (Fr.-Mex. 1983). When a state party is internally constituted as a federal system, that state party may not justify a failure to comply on the grounds that the noncompliance is the act of a constituent state. *The Montijo* (U.S. v. Colom. 1875), *reprinted in* 2 John Basset Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* 1421, 1440 (1898); Ivan Bernier, *International Legal Aspects of Federalism* 83 (1973).

Having undertaken solemn treaty obligations to Canada under the CVTMS Agreement, and to Canada and other parties to the International Maritime Treaties, the United States is not free to allow its constituent states to impose on maritime traffic within United States

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[7] Although the United States is not a party to the Treaty Convention, that convention is recognized as a codification of existing norms of customary international law. *See Restatement (Third) of Foreign Relations Law of the United States*, introductory note 18-19 (1987).

waters regulations or conditions that conflict with these treaty obligations to Canada.

II.

If Enforced, the BAP Regulations Would Violate the United States' Obligations to Canada Under the CVTMS Agreement

The key to the functioning of the CVTMS system is the parties' joint recognition of each other's regulatory regimes insofar as these affect vessels operating in the Strait of Juan de Fuca region. *See supra* pp. 4-5. This system based on mutual recognition was established in 1979 with the signing of the Agreement; in 1994, it was further strengthened by the Marine Safety and Marine Environmental Protection Comparability Analysis ("1994 Study"), which was conducted jointly by the United States and Canadian Coast Guards.[8/]

The 1994 Study was prompted by new legislative and regulatory changes introduced in both countries, in particular the United States Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in various portions of Titles 33 & 46 of the United States Code) and the amendments to the Canada Shipping Act, S.C. 1993, ch. 36 (Can.). The Canadian and United States Coast Guards reviewed their respective regulations in the areas of vessel design and

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[8/] Canada has lodged twelve copies of the 1994 Study with the Office of the Clerk of the Supreme Court of the United States.

construction, shipboard equipment, personnel qualifications and manning, shipboard operations, and pollution response, and determined that "broad overall comparability exists between the United States' and Canada's marine safety and marine environmental protection regimes." 1994 Study at i.

Of special relevance in this case is the provision of the CVTMS Agreement mandating reciprocal recognition of "vessel design, construction, manning and equipment requirements, and the measures for enforcement of these requirements" for ships incidentally transiting the waters of the other party in the Juan de Fuca region. CVTMS Agreement, art 204.2 (A-12). As a result of these provisions, ships bound for Canada, which are required by the CVTMS Agreement to transit United States waters, are deemed to be in material compliance with United States regulations so long as they comply with Canadian regulations. Similarly, ships outbound from the United States, which are required by the CVTMS Agreement to transit Canadian waters, are deemed to be in material compliance with Canadian regulations so long as they comply with United States regulations.

This reciprocity in according deference to the regulatory regime of each state party is vital to the functioning of the CVTMS Agreement and to the safe operation of ship traffic in the Juan de Fuca region. In the twenty years that the Agreement has been in effect, this system based on mutuality of recognition has worked well; indeed, the CVTMS Agreement has served as a model for the international community.

The BAP regulations repudiate the very basis of the Agreement – the reciprocal recognition of, and

acquiescence in, each state party's regulatory regime – for they purport to override Canada's standard-setting by imposing additional requirements on ships bound for Canadian ports. Not only is this result legally offensive, but, on a practical level, the BAP regulations undermine the viability of a traffic management system that was put in place to promote safe passage through a busy shipping corridor and to minimize the occurrence of environmental damage. Ships may seek to avoid the additional Washington State regulations by remaining in Canadian waters, either approaching Canada via the hazardous Johnstone Strait or transiting inbound and outbound in Canadian waters in the Strait of Juan de Fuca. Either way, the chance of an accident causing environmental damage is increased.

The BAP regulations thus threaten the integrity of the system, as well as the ability of the United States and Canada to achieve the goals of the CVTMS Agreement.

III.

If Enforced, the BAP Regulations Would Violate the United States' Obligations to Canada under the International Maritime Treaties

Canada, the United States, and other countries have worked for many years in international fora such as the International Maritime Organization to establish treaties governing international shipping. Under the International Maritime Treaties, the United States owes a number of obligations to Canada that are in addition

to those obligations established in the CVTMS Agreement. These obligations include, for example, the acceptance of Canada's certification that Canadian flagged vessels meet the criteria set out in the treaties, unless there are clear grounds for believing otherwise. Canada is similarly bound under these treaties to accept the United States' certification of United States-flagged ships.

Washington's BAP regulations cover subjects squarely dealt with under the International Maritime Treaties, notably the SOLAS Convention and the STCW Convention, in a manner inconsistent with the obligations created by those treaties. For example, BAP creates fleet-wide standards for bridge resource management, Wash. Admin. Code § 317-21-200(2), that are mandatory even for vessels never entering Washington waters. Bridge resource management is a nonmandatory item under the STCW Convention and is treated as such under Canadian regulations. In essence, if compliance with the BAP regulations affecting vessel operations, equipment, and manning were required, the United States effectively would be refusing to recognize as valid Canada's certification that its own ships meet the standards required under the treaties.

CONCLUSION

If upheld by this Court, the decision below would place the United States in the position of violating its treaty obligations to Canada. Canada therefore urges this Court to set aside the offending BAP regulations and to enforce the United States' obligations under the relevant international agreements.

Dated: Washington, D.C.
October 22, 1999

Respectfully submitted,

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APPENDIX

Canadian Embassy Ambassade du Canada

Note No. 0389

The Embassy of Canada presents its compliments to the Department of State of the United States of America and has the honour to refer to legal proceedings currently before the United States Court of Appeals for the Ninth Circuit, concerning the constitutionality of certain State of Washington statutes and regulations pertaining to the operation of oil tankers in state waters.

The Government of Canada notes that the initial lawsuit was brought by the International Association of Independent Tanker Owners (INTERTANKO) against the State of Washington and several of its officials before the United States District Court Western District, which dismissed the action in November 1996.

The Government of Canada is of the view that all laws, both federal and state, must comply with the 1979 Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (VTMS Agreement) and respect the principle of reciprocity which is crucial to the successful joint management of vessel traffic in the Strait of Juan de Fuca. It is the position of the Government of Canada that the application of certain of these Washington State regulations to vessels in-transit through United States' waters in the Strait of Juan de Fuca departing from Canadian ports violates the VTMS Agreement and has the unintended effect of jeopardizing

marine safety and environmental protection in the region.

The Embassy of Canada avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., May 7, 1997

EXCHANGE OF NOTES BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA CONSTITUTING AN AGREEMENT ON VESSEL TRAFFIC MANAGEMENT FOR THE JUAN DE FUCA REGION

OTTAWA, December 19, 1979.

FLM-211

Excellency,

I have the honour to refer to discussions between representatives of our two Governments for the purpose of reaching agreement on cooperative arrangements for vessel traffic management in waters near the common boundary of Canada and the United States in the region of Juan de Fuca Strait. Such arrangements are desirable for marine safety in light of increasing oil tanker and other vessel traffic in the west coast waters of Canada and the United States. The world-wide trend towards large tankers, and the possibility of their presence in coastal areas where they might add to the existing traffic, greatly strengthen the need for such cooperation.

The two Governments have already taken a number of parallel measures for safety of navigation in the Juan de Fuca area, including improved communications, surveillance radar installations and a voluntary routing system. I have the honour to propose that these cooperative arrangements be further strengthened. The attached Annex sets out the arrangements for implementation of a cooperative vessel

traffic management system for the region of Juan de Fuca Strait, consistent with our shared goals of safety of navigation and preservation of the marine environment.

I have the honour to propose that if these arrangements are acceptable to the United States Government, this Note, together with the attached Annex, which are authentic in English and French, and your confirming reply, shall constitute an Agreement between our two Governments for vessel traffic management in waters near the common boundary of Canada and the United States in the region of Juan de Fuca Strait. I have the honour further to propose that this Agreement enter into force on the date of your reply. This Agreement may be terminated by either Government upon six months' notice to the other or upon such longer period as may be specified in the notice of termination.

Flora MacDonald
Secretary of State for External Affairs

His Excellency Kenneth Curtis,
Ambassador of the U.S.A. to Canada,
OTTAWA.

ANNEX

AGREEMENT FOR A COOPERATIVE VESSEL TRAFFIC MANAGEMENT SYSTEM FOR THE JUAN DE FUCA REGION

100 PURPOSE AND OBJECTIVE

100.1 The purpose of this Agreement is to provide for a cooperative system of vessel traffic management in the applicable waters.

100.2 The objective of this Agreement is to enhance safe and expeditious vessel traffic movement and to minimize risk of pollution of the marine environment in the applicable waters by setting forth standards and procedures for:

(a) establishing a cooperative system of vessel traffic management;
(b) ascertaining through pre-clearance procedures and subsequent traffic monitoring, vessel compliance with pertinent regulations, procedures and practices; and alerting responsible authorities where non-compliance occurs;
(c) monitoring traffic movements to the degree required of the locality;
(d) providing on a routine basis, or on request, real time information to mariners on traffic, navigational dangers, weather and other safety matters;
(e) providing on request position fixing data where

this capability exists;

(f) responding to emergency situations.

101 DEFINITIONS

101.1 Applicable Waters

Means the waters on the southern coasts of British Columbia and the northern coasts of the State of Washington that are bounded:

(1) in the waters through which the international boundary runs,

(a) on the north, by the 49° north parallel of latitude, and

(b) on the south and east, by a rhumb line joining Point Partridge (Whidbey Island) and McCurdy Point (Quimper Peninsula); and

(2) in the waters to seaward

(a) on the northwest, by the 48°35'45" north parallel of latitude,

(b) on the southwest, by the 48°23'30" north parallel of latitude, and

(c) on the west, by the rhumb line joining 48°35'45"N., 124°47'30"W. with 48°23'30"N., 124°48'37"W.

102.2 Authority

Means the Commissioner of the Canadian Coast Guard of the commandant of the United States Coast Guard.

101.3 Berth

Means any wharf, pier, anchorage or mooring buoy.

101.4 Canadian Vessel Traffic Regulator or U.S. Watch Supervisor

Means the person at a vessel traffic management centre authorized by the appropriate authority to administer the vessel traffic management regulations.

101.5 Cooperative Vessel Traffic Management System

Means the cooperative system of vessel traffic management established within the applicable waters pursuant to this Agreement.

101.6 Exchange Line

Means a sector boundary where vessel traffic passes from management by one Authority to management by the other Authority.

101.7 Parties

Means the Government of Canada and the Government of the United States of America.

101.8 Routing System

Means any system of routing measures aimed at reducing the risk of casualties, including traffic separation schemes, two-way routes, recommended tracks, areas to be avoided, inshore traffic zones, roundabouts, precautionary areas and deep water routes.

101.9 Sector

Means a subdivision of the applicable waters geographically defined for purposes of allocating the responsibility for vessel traffic management to one of the Authorities.

101.10 Traffic Clearance

Means an authorization by a Canadian vessel traffic regulator or a U.S. watch supervisor for a vessel to enter the cooperative vessel traffic management system, depart a berth, proceed or manoeuvre within the applicable waters.

101.11 Vessel

Means every description of water craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water.

101.12 Vessel Traffic Management

Means the management of vessel traffic by the use of such procedures and equipment as may be agreed by the Authorities, including vessel movement reporting systems, radar surveillance equipment, standard operation procedures and routing systems.

101.13 Vessel Traffic Management Centre

Means a centre established by the appropriate Authority for managing vessel traffic in the cooperative vessel traffic management system.

101.14 Vessel Traffic Management Regulations

Means regulations promulgated by each Party for vessel traffic management pursuant to this Agreement.

102 APPLICATION TO VESSELS

102.1 Except as otherwise herein provided this Agreement shall apply to all vessels.

102.2 Any vessel that is exempt from compliance with the provisions of this Agreement shall observe the ordinary practice of seamen and, so far as is reasonable and practicable, act in a manner consistent with this Agreement.

103 EXCHANGE LINES

103.1 The Exchange Lines in the applicable waters are as follows:

(a) The 124°40' west meridian of longitude in the Juan de Fuca Strait from the Canadian low-water line to the U.S. low-water line as depicted on official charts;

(b) Donaldson Island in position 48°19'54"N., 123°42'24"W. to position 48°13'37"N., 123°31'36"W.; thence to position 48°12'32"N., 123°24'24"W.; then to Hein Bank in position 48°21'06"N., 123°02'30"W.; thence to Cattle Point, San Juan Island in position 48°27'00"N., 122°57'42"W.;

(c) Lime Kilm Point in position 48°31'00"N., 123°09'06"W. to Kellet Bluff in position

48°35'18"N., 123°12'03"W.; thence to Turn Point in position 48°41'20"N., 123°14'10"W.; thence to Skipjack Island in position 48°44'00"N., 123°02'16"W.; thence to Clements Reef in position 48°46'42"N., 122°53'22"W.; thence to Alden Bank Buoy in position 48°50'24"N., 122°52'10".; thence in a 000° direction to the point of intersection with the 49°00'N. parallel of latitude.

103.2 The Exchange Lines may be modified by agreement of the Authorities, pursuant to recommendations of the Joint Coordinating Group established under this Agreement.

200 JOINT POLICY

201 JOINT PROCEDURES

201.1 The Parties agree that the development and implementation of the cooperative vessel traffic management system is best achieved by:

(a) developing and issuing vessel traffic management regulations and developing standard procedures at the headquarters level of the Authorities;

(b) developing the local vessel traffic management technical and operational details at the regional and district level of the Authorities, within the framework of national standards, with headquarters consultation; and

(c) developing routing systems and vessel traffic management systems taking into account, where appropriate, standards developed at IMCO on ships' routing and ship movement systems.

202 SYSTEM COMPATIBILITY

202.1 The Parties agree that the cooperative vessel traffic management system procedures and regulations in each country shall be compatible, to the extent possible, with those in the other and that any joint traffic separation scheme shall be submitted to the Inter-Governmental Maritime Consultative Organization.

203 REGULATING OF VESSEL TRAFFIC

203.1 Each Party undertakes to promulgate all vessel traffic management regulations necessary to give effect to this Agreement. The Authorities shall jointly determine the vessels to which particular regulations shall apply.

204 COMPATIBILITY OF OTHER REGULATIONS AND THEIR ENFORCEMENT

204.1 The Parties recognize the desirability of compatibility in their respective national regulations bearing on marine safety and environmental protection applicable to vessels using the cooperative vessel traffic management system. The Parties further recognize the desirability of consultation and coordination between

the Authorities to promote compatibility of these regulations to the fullest extent practicable consistent with domestic law and policy. At the request of either Authority, the other will provide an opportunity for consultation and coordination concerning such regulatory measures significantly affecting vessels using the cooperative vessel traffic management system.

204.2 The Parties consider that their respective vessel design, construction, manning and equipment requirements, and the measures for enforcement of these requirements, provide a comparable degree of marine safety and environmental protection and that their cooperative application will enhance the effectiveness of the vessel traffic management system. Each Party recognizes that vessels meeting its own standards enter the waters of the other Party in accordance with the agreed routing system. Each Party, in applying its regulations to vessels proceeding through its portion of the applicable waters solely en route to or departing from a port of the other Party, will consider compliance with the requirements of the other Party to be effectively equivalent to material compliance with its own requirements, so long as the requirements and enforcement practices of the other Party, in their totality, continue to provide a comparable degree of marine safety and environmental protection.

204.3 Nothing in Article 204 shall derogate from the right of each Party to take appropriate measures in accordance with its law in its portion of the applicable waters in relation to any specific vessel, the condition or

activities of which may pose an actual threat to marine safety or the marine environment. In order to facilitate cooperative enforcement action each Authority will consult at the request of the other, where time permits, concerning enforcement measures to be taken in particular situations posing a threat to marine safety or the marine environment in the applicable waters.

204.4 Should either Party consider making a determination that the requirements and measures for enforcement referred to in 204.2, in their totality, no longer provide a comparable degree of marine safety and environmental protection, that Party will notify the other Party and offer to consult on the matter. No final determination will be made in this respect for at least six months from the time of initial notification in order to allow sufficient time for the consultation process to be completed.

205 RELATION TO NATIONAL LAW AND POLICY

205.1 This Agreement and actions hereunder shall be without prejudice to the position of the Government of the United States and Canada with respect to the character of, and the nature and extent of coastal state jurisdiction over the applicable and adjacent waters.

206 RESPONSIBILITY FOR SAFE NAVIGATION

206.1 It is not the purpose of the cooperative vessel traffic management system instituted under this Agreement to attempt to manoeuvre or navigate vessels

from the shore. Therefore, the responsibility for safe navigation shall remain with the vessel's master or commanding officer. Notwithstanding any requirement in the vessel traffic management regulations, the master or commanding officer of the vessel shall retain the responsibility to take any action which by the ordinary practice of seamen or by any special circumstances is necessary to ensure safety of life or the safety of his own or any other vessel.

207 ENFORCEMENT

207.1 In the applicable waters under its jurisdiction, each Party shall enforce compliance with its vessel traffic management regulations.

208 NAVAL VESSELS AND GOVERNMENT VESSELS

208.1 Warships, naval auxiliaries and other vessels used for the time being for military purposes in non-commercial service will comply with the provisions of this Agreement, except when compliance would impair defence operations or defence operational capabilities. To the extent that it is consistent with the nature of these operations notice will be given to the vessel traffic management centre concerned.

208.2 Other vessels owned and operated by a State and used for the time being only on Government non-commercial service and performing governmental functions in the applicable waters will comply with the provisions of this Agreement, except when compliance

would impair the performance of governmental functions of a marine contingency nature. To the extent that it is consistent with the nature of the governmental functions being performed, notice will be given to the vessel traffic management centre concerned.

300 OPERATIONAL ELEMENTS

301 VESSEL TRAFFIC CLEARANCE

301.1 Prior to entering the cooperative vessel traffic management system or departing a berth within the system, each vessel shall obtain a traffic clearance in accordance with procedures to be agreed upon between the Authorities.

302 VESSEL TRAFFIC MANAGEMENT CENTRES

302.1 Vessel traffic management centres shall be established as necessary to manage and coordinate vessel traffic. These centres shall be in communication with each other by dedicated communications circuits in order to ensure real time knowledge of the total vessel traffic pattern in the applicable waters.

303 METHOD OF OPERATIONS

303.1 Each vessel traffic management centre shall, within its applicable sector:

(a) maintain VHF-FM radio contact with and receive reports from each vessel subject to the communications and movement reporting

requirements of the vessel traffic management regulations;

(b) maintain an accurate and up-to-date plot of all such vessels;

(c) maintain an accurate and up-to-date status display of all known hazards to navigation, including adverse weather conditions, large concentrations of fishing or recreational vessels, and discrepancies in aids to navigation;

(d) disseminate the information referred to in sub-paragraph (c) to all participating vessels that may be affected;

(e) provide, upon request, position fixing assistance, within the capability of the centre;

(f) in accordance with an agreed procedure, issue a vessel traffic clearance;

(g) in accordance with an agreed procedure, transfer responsibility between centres for each vessel at the time it crosses an exchange line; and

(h) upon detecting or becoming aware of any violation of the vessel traffic management regulations, report the violation to the appropriate enforcement official of the Party in whose waters the violation occurred.

304 SECTOR MANAGEMENT AND RESPONSIBILITY

304.1 All vessel traffic within the applicable waters to seaward of the exchange line established in subsection 103.1(a) shall be managed by Tofino Traffic Centre.

304.2 All vessel traffic to the east of the exchange line established by subsection 103.1(a) and to the south and east of the exchange lines established by subsections 103.1(b) and 103.1(c) shall be managed by the Seattle Traffic Centre.

304.3 All vessel traffic to the north and east of the exchange lines established by subsection 103.1(b) and 103.1(c) shall be managed by Vancouver Traffic Centre.

305 POLLUTION CONTINGENCY SUPPORT

305.1 In the event of a pollution incident occurring within the applicable waters where a response by one or both Parties under the terms of the Joint Canada/United States Marine Pollution Contingency Plan is required, the Authorities shall cooperate to the maximum extent practicable with the On-Scene Commander.

306 STANDARDS OF SHORE BASED EQUIPMENT

306.1 The Parties agree it is desirable to establish at the earliest feasible time a positive method of surveillance, generally radar where practicable, to ensure compliance with vessel traffic management regulations.

306.2 Except as they may otherwise agree, each authority shall be responsible for establishing, operating, and maintaining:

(a) VHF-FM communications coverage within its sectors, and

(b) radar surveillance systems incorporating provisions for the identification and tracking of vessels as follows:

(1) Canada: Strait of Georgia and Haro Strait from Point Roberts to Race Rocks; and on the west coast of Vancouver Island, from Estevan Point to Cape Flattery, Washington.

(2) United States: the Strait of Juan de Fuca from Cape Flattery to Whidbey Island; and Rosario Strait from Cherry Point to the southern entrance in the vicinity of Whidbey Island.

307 JOINT COORDINATING GROUP

307.1 The Authorities shall establish a Joint Coordinating Group at the Regional/District level. This Group shall have a permanent membership consisting of two VTM representatives from each Authority, one of whom shall serve as the Chairperson and that office shall alternate annually between each Authority. This Group may seek expert advice as it may deem appropriate. A meeting of the Joint Coordinating Group may be called by either Authority but in any event, it shall meet and submit a report to the Authorities annually.

307.2 The functions of this Group shall be:

(a) to receive and respond to representations by interested parties on operational problems of a local nature;

(b) to review and make early reports to both Authorities regarding the findings of any casualty investigation authority when a factor in its investigation concerns the management of traffic in the cooperative vessel traffic management system;

(c) to review and make recommendations to the Authorities concerning operating procedures and regulations;

(d) to review and make recommendations to the Authorities respecting modifications of the exchange lines established by section 103.1 of this Agreement;

(e) to advise the Authorities on policy and standards;

(f) to recommend to the Authorities consultative and operational procedures to be followed when a vessel is found to be in contravention of the vessel traffic management regulations; and

(g) to facilitate consultations between the Authorities on the effective implementation of this Agreement.

308 COMMUNICATIONS

308.1 The Parties undertake to promulgate in consultation with each other appropriate

communications regulations to ensure reliable and effective two-way voice communications throughout the vessel traffic management system.

309 AIDS TO NAVIGATION

309.1 The establishment and maintenance of aids to navigation in the applicable waters shall remain the responsibility of the Authority in whose territory or water the aids to navigation are located, except as may be otherwise expressly agreed by the Parties.

400 ADMINISTRATION AND RESPONSIBILITY

400.1 The Authorities shall be responsible for the administration of this Agreement.

400.2 The federal officers having Regional/District responsibilities for administration and operation of the cooperative vessel traffic management system are:

For Canada: The Regional Director,
Canadian Coast Guard,
Western Region.

For United States: The Commander,
Thirteenth Coast Guard District.

401 AMENDMENTS

401.1 Amendments to this Agreement may be made by mutual agreement of the Parties.

402 IMPLEMENTATION

402.1 The Authorities shall implement the cooperative vessel traffic management system as soon as possible, subject to appropriation of funds.

402.2 Each Party shall bear the costs of its own operations conducted pursuant to this Agreement.

A-22

Embassy of The
United States of America

Ottawa, December 19, 1979

No. 341

Madame,

I have the honor to refer to your note No. FLM-211 of this date, and to its Annex, proposing cooperative arrangements for joint management of vessel traffic in waters near the common boundary of Canada and the United States in the region of Juan de Fuca Strait.

I have the further honor to confirm that the cooperative arrangements set forth in your Note and its Annex are acceptable to the Government of the United States, and that your Excellency's Note and its Annex, together with this reply, shall constitute an agreement on this subject between our two Governments which will enter into force on the date of this Note.

Accept, Madame, the renewed assurances of my highest consideration.

Kenneth M. Curtis

The Honorable
Flora MacDonald, P.C., M.P.
Secretary of State for External Affairs
Ottawa